Supreme Court, U.S.
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No. 93-1614

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BOBBY JOE HUGHES,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Virginia correctly ruled that, under the law of the case, the evidence presented no jury issue on the question of respondent's negligence because no evidence existed from which the jury could conclude that respondent knew, or in the exercise of ordinary care should have known, that the assertedly dangerous condition existed, or that respondent had a reasonable opportunity to remedy the condition?

2. Whether the Supreme Court of Virginia correctly ruled that the evidence presented no jury issue on a claim of negligent failure to provide adequate lighting, and moreover that petitioner had abandoned any such claim at trial?

RULE 29.1 LISTING

Respondent's parent corporation is Norfolk Southern Railway Company, whose parent is Norfolk Southern Corporation. Respondent has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, the Norfolk and Western Railway Company ("NW"), respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Supreme Court of Virginia's opinion and judgment in this case.

OPINION BELOW

The opinion of the Supreme Court of Virginia (App. 5-16) is reported at 247 Va. 113, 439 S.E.2d 411 (1994).[1]

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[1] The transcription of the Supreme Court of Virginia's opinion in the appendix to the petition contains one major omission and several errors. The sentence that bridges App. 10-11 should read: "Even though the standard of proof in a F.E.L.A. action is more lenient than in a common law action, the plaintiff nevertheless *is still required to establish some act of negligence* in order to prevail." The first line on App. 8 should read: ". . . only thing I saw *was* a . . ." The tenth and eleventh lines on App. 12 should read: ". . . should have know*n* of the existence . . . . However, th*e*re is no evidence. . . ." [The italics show the corrections.]

STATEMENT OF THE CASE

A. Procedural History.

Petitioner Bobby Joe Hughes ("Hughes") sued NW in the Circuit Court for the City of Roanoke, Virginia, under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, which creates a cause of action in favor of a railroad employee claiming to have suffered injury "resulting in whole or in part from the negligence of" his employer. (R. 1-3.)[2]

At trial, NW moved the court to strike Hughes' evidence (equivalent to a federal Rule 50(a) motion for a directed verdict) at the close of Hughes' evidence and at the conclusion of all the evidence on the ground that the evidence failed as a matter of law to raise a jury issue as to NW's negligence. Both motions were denied. (Tr. II.55-60, 97.) The jury awarded Hughes $800,000.00. (Tr. II.104, R. 276.) The trial court denied NW's post-trial motion, made on this same ground, to set aside the verdict and enter final judgment for NW (equivalent to a federal Rule 50(b) j.n.o.v. motion). NW's alternative motion for a new trial, based on a major evidential question and on the asserted excessiveness of the verdict, was denied. The trial court entered judgment on the verdict. (R. 292-94; App. 1-2.)

The Supreme Court of Virginia granted NW's petition for appeal on the issues of the sufficiency of Hughes' proof of negligence, the evidential ruling, and excessiveness. In a unanimous opinion, that court reversed and entered final judgment for NW on the ground that the evidence failed, as a matter of law, to raise a jury issue regarding NW's negligence. (App. 5-16.) In light of

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[2] The record on appeal was hand numbered by the Clerk of the trial court in accordance with Virginia practice, and it will be cited by page number, *e.g.*, R.1. Each volume of the two-day trial transcript is separately paginated and will be cited by volume number and page, *e.g.*, Tr. I.1.

this disposition, the Virginia Supreme Court found it unnecessary to address the grounds for a new trial urged by NW. (App. 16.)

B. The Evidence on Liability.

Hughes claimed that he was injured on the night of October 14, 1988, while working as an NW brakeman on tracks located in Webb, West Virginia. The tracks at Webb consist of the eastbound and westbound main lines and a single siding situated between the main lines. The west end of the siding connects with the westbound main line at approximately milepost 19. (Pl. Exh. 6; Tr. II.80.) Shortly before midnight, Hughes' train crew pulled a string of cars from the siding and coupled them onto a string standing on the westbound main track, making a train one and a half to two miles long. (Tr. I.84-85, 87). The engineer applied the airbrakes as a test. Hughes, who had worked for NW for 26 years, most of that time as a brakeman (Tr. I.81-83), then performed his brakeman's duty of walking the length of the train eastward to inspect the piston above the wheels on each car that revealed, by its position, whether the brakes were engaging. He reached the east end of the train, signaled the engineer to release the brakes, and started back, once more checking each piston to determine whether the brakes had released. (Tr. I.85-87.)

Until the moment of his fall, Hughes performed these duties by walking in the area between the westbound main line on which the cars were located and the adjacent track, except at one point toward the west end of the area, where the tracks crossed a stream, Hughes had to walk on the bridge for the eastbound main line as it spanned the stream. (Tr. I.88-89.) It was dark in the area, and Hughes used his NW-issued lantern to light his way and inspect the pistons. His lantern had two bulbs, one providing a focused beam and the other casting a broad light for walking. (Tr. I.88-89, 91; Tr. II.84.)

Hughes testified at trial that, after he had walked for a mile or more back westward toward the head of the train, crossed the stream, and returned to the area between the tracks, his "legs g[o]t tired, fatigued, and on the eastbound where it was surface and everything, the ballast seemed to be pretty level so I stepped up on that ballast to walk a little to rest my legs, and I stumbled and tripped and fell." (Tr. I.89.) Hughes caught himself on his arms and hands but then "scooted" on his arms and knees. (Tr. I.89.) Hughes testified that he did not see anything before he fell, but that he looked back by lantern light afterwards and only then saw the condition to which he ascribed his fall. (Tr. I.114.)

Hughes got up and finished walking the length of the train. He then reported to the engineer and conductor that he had fallen and filed an incident report. (Tr. I.90.) On that report form, which Hughes himself filled out (Tr. I.91, 113), he described the incident as follows:

> Walking brakes off train after pickup and stumbles and fell[;] it was very dark and as I was checking one airbrake with lantern my toe hit crosstie or something causing me to fall . . . I was walking brakes off on train 60513 west after pickup at Webb W. Va. and about MP [milepost] No. 19.5 between the east bound and west bound track, and stumbled over something and fell hurting right shin and knee, right arm just above wrist, and left arm, end of tie sticking up was the only thing I saw.

(Pl. Exh. 7.) In answer to a question on the form about whether rail equipment was directly involved in the incident, Hughes responded, "end of tie sticking up." To the question, "Was rail equip. defective?," Hughes answered, "Don't know." (Pl. Exh. 7.)

Hughes reported the incident verbally to Mr. Holman, the trainmaster for this district, within a few hours after the incident and before Hughes went off duty. (Tr. II.77-78.) Hughes told Holman that "he was walking between

the middle track at Webb and walking westward" and he had "slipped on or tripped over . . . a piece of a tie sticking up between the tracks or something, is what he said. He didn't really—wasn't certain of what it was, but he assumed it was a piece of tie." (Tr. II.79.) Based on this communication, Holman also filled out a report form. (Pl. Exh. 9.)

Hughes told Holman, and Holman recorded, that the accident occurred at milepost 19. (Tr. II.79-80, Pl. Exh. 9.) Hughes also told Holman that the accident occurred at the west switch at Webb, while he was walking between the middle (siding) track and the westbound main line.[3] (Tr. II.79-80, 87.) This information also located the incident near milepost 19, because the west end of the siding connected with the westbound main line at that point. There was no siding track farther west, toward milepost 19.5. (Tr. I.87-88; II.79-80, 87; Pl. Exh. 6.) On his own report form Hughes had identified the location of his fall as milepost 19.5, but Holman did not know this at the time. Holman never saw Hughes' report until his deposition a few months before trial. (Tr. II.87-88.) Hughes did not tell Holman that he was up on the eastbound main line itself when he was hurt, although that was his testimony at trial. (Tr. II.86.)

Holman waited for daylight and went to Webb to inspect the area where Hughes fell in order to find and remove the tie and prevent other injuries. (Tr. II.79-80.) Holman came into the Webb facility from the west end and inspected the area "where Mr. Hughes indicated to me that he had fallen," as well as walking the entire length of the track on both sides, looking for something that might have caused Hughes to fall. (Tr. II.81-82.) Holman testified, "I did not find anything which I felt

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[3] In railroad terminology, "between the tracks" is not equivalent to "between the rails of a track." For safety reasons, established railroad rules prohibit railroad workers from walking between the rails of a track except when their duties absolutely require such action. (Tr. I.62-64.)

would cause anybody to trip. I found it to be a normal railroad walking condition." (Tr. II.82.)

At trial Hughes said that he tripped over a "split" crosstie located on the eastbound main line, rather than in the area between the tracks as he had stated on his own report form and had told Holman. (Tr. I.90, 113-14, 134.) Hughes was not certain that he had tripped over the tie he claimed to have seen:

> Q. Are you telling us now, though, that you are sure that it was the end of that particular crosstie that you saw that you tripped over?
>
> A. I am telling you now that is the only thing that I saw that night. (Tr. I.113.)
>
> * * *
>
> I just flashed my light around and that was the only thing I could see. (Tr. I.114.)
>
> * * *
>
> . . . For me to say one hundred percent for a fact that that split crosstie I saw was definitely it, I would not swear to it. But that was the only thing that I saw. (Tr. I.116.)
>
> * * *
>
> . . . The only thing I saw was the split crosstie. (Tr. I.117.)

The sole description at trial of what Hughes assertedly saw after he fell was as follows:

> Q. How far did you say the crosstie protruded up above the ballast?
>
> A. Two to four inches.

(Tr. I.114.) Hughes did not quantify how much of the offending railroad tie was "split." He did not indicate whether or how far the "split" portion protruded above the remainder of the tie. Hughes did not indicate whether the differential between the crosstie and the ballast represented a differential between a flat tie end and a de-

pressed ballast level, or represented a tie end, some or all of which was unnaturally protruding above ballast that would otherwise have been even with a flat tie end. Hughes admitted that having "ballast not being exactly even with the ends of the crossties" is not unusual and that "we see that quite often." (Tr. I.115.)[4]

The record contains no evidence suggesting that NW actually knew of the existence of the split tie that Hughes claimed to have seen briefly after he fell. No one, including Hughes, saw the condition before Hughes' accident. (Tr. I.114.) No one saw Hughes fall. The condition Hughes described could not be located afterwards. Hughes introduced no photographs of the condition and produced no witness to corroborate its existence. The record contains no evidence relating in any way to when the condition described by Hughes arose, how long it had existed, or what caused the condition to exist.

During the year preceding October 14, 1988, and continuously since then, the NW tracks at Webb were inspected twice each week, on Mondays and Thursdays, in compliance with Federal Railway Administration requirements. These inspections consisted of visual examination of the tracks and surrounding structures. (Tr. II.14-16.) Although Hughes did not prove the day of the week upon which the incident occurred, the calendar shows that October 14, 1988, was a Friday. Additionally, scheduled maintenance by system production gangs had been performed on the eastbound main line track at Webb in June 1988, some four months before Hughes fell. (Tr. II.16-17.)

At trial, one of Hughes' witnesses testified that an artist's drawing (the use of which gave rise to the evidential issue underlying NW's motion for a new trial) depicted a "split raised crosstie." (Tr. I.56-57.) The witness, a former brakeman and union officer, testified that

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[4] Ballast is crushed stone used under and near railroad tracks to facilitate drainage. (Tr. I.55.)

he would report a "split, raised crosstie" to the railroad as an "unsafe condition." (Tr. I.58.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW DOES NOT RAISE EITHER OF THE QUESTIONS PRESENTED IN THE PETITION.

In his Questions Presented for Review, petitioner effectively asserts that the Supreme Court of Virginia improperly imposed on his case its own common law standards regarding notice of a defective condition and negligence, rather than the proper federal standards. *See also* Pet. at 21. This assertion is not accurate.

All parties and all courts have unwaveringly acknowledged that the question of NW's potential liability in this case is governed by federal law. That proposition is indisputable. The case was briefed and argued at all levels on this basis. Nothing in the Virginia Supreme Court's opinion in any way suggests that anything other than the proper federal standards were applied in this case. The Virginia Supreme Court expressly acknowledged its complete reliance on the governing federal standards, rather than common law principles. (App. 9-11.) Petitioner has not pointed, and cannot point, to anything in the opinion below that raises the questions he would have this Court review.

Petitioner's Questions Presented, moreover, do not frame realistic issues that could merit this Court's attention. Even *if* the common law imposed higher standards for notice of a defective condition and negligence than the governing federal law—a proposition petitioner does not and, NW believes, cannot demonstrate—no court and no party in this case has advocated changing the governing federal law. Simply put, petitioner's Questions Presented do not exist in this case.

Regarding the "standard of notice" applied here (petitioner's Question Presented No. 1), petitioner omits to

mention that this element of his case was established through instructions Nos. 12 and 13, which were given without objection at trial and which thus became the law of the case:

Instruction No. 12

> The Court instructs the jury that in order for the Plaintiff to recover, the Plaintiff must prove by a preponderance of the evidence that the Defendant knew, or, in the exercise of ordinary care, should have known that such a condition existed and that it had a reasonable opportunity to remedy the condition.

Instruction No. 13

> The Court instructs the jury that notice and knowledge to the railroad of an unsafe condition or practice may be actual notice or constructive notice. Constructive notice is that knowledge of a condition or practice the railroad should have discovered by exercising ordinary care.

(R. 172-73; App. 11.) In oral argument before the Virginia Supreme Court, petitioner's counsel expressly conceded, in response to a question from the bench, that the instructions were an appropriate statement of the governing law. In his argument, petitioner never articulates any alternative, assertedly more "proper" notice standard. Instead, he argues that his evidence was sufficient to meet the burden he accepted under the instructions. That is not the issue he poses for this Court's review, however.

Petitioner's second Question Presented involves the "standard of negligence" appropriate in an FELA case. Once again, petitioner neglects to mention that the standard governing this case was established in instructions given without objection. Those instructions plainly were correct, which is why petitioner had no objection to them, and why he fails to articulate any different standard of negligence for this Court's consideration. Once again, petitioner instead argues that he presented sufficient evidence of negligence—which is not the issue he raises.

Petitioner improperly invokes *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957), in his second Question Presented. *Rogers* is a case about causation under the FELA, not negligence. It highlighted the statutory liability of employers for injuries "resulting in whole *or in part*" from their negligence, and disapproved of decisions imposing a more burdensome standard of causation on FELA plaintiffs. There is no dispute in the case at bar about causation, however. *Rogers* also reaffirmed the governing federal test for determining whether a jury question has been made out. In its opinion here the Virginia Supreme Court quoted extensively from *Rogers* on this point (App. 9-10) and applied precisely the appropriate standard: it reviewed the evidence and all reasonable inferences arising from the evidence in the light most favorable to petitioner to determine whether a jury issue existed on negligence. (App. 6, 9-14.)

The petition should be denied because the questions it poses for review are not raised by the opinion below, and because petitioner's argument fails to support the questions he asks this Court to review.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF THE COURTS OF APPEALS.

Petitioner claims that the ruling below conflicts with decisions of this Court and of the Courts of Appeals. That assertion is incorrect. The result in each of the cases petitioner discusses reflects the allegations made and the evidence presented. Where a plaintiff has fairly alleged negligence, this Court has ruled that the complaint may not be dismissed on motion. Where evidence of a railroad's negligence has coexisted with evidence that the negligence played any part at all in the plaintiff's injury, this Court has ruled that the plaintiff's case should go to the jury. But where, as here, the plaintiff's proof has failed, the defendant has been entitled to judgment as a matter of law.

For instance, in *Urie v. Thompson*, 337 U.S. 163 (1949), the Missouri Supreme Court had improperly extended the function of a demurrer and had dismissed a plaintiff's FELA claim as a matter of law, ignoring his allegations that the railroad had knowingly used excessive quantities of a dangerous material and had negligently adjusted the dispensing equipment. In reversing, this Court emphasized that the issue of what constitutes negligence under the FELA is a federal question, and that well-pleaded allegations must be accepted as true for purposes of demurrers. 337 U.S. at 174-75. This Court also observed that one element of the plaintiff's claim of negligence under the FELA was whether "respondent 'knew or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect petitioner," and this Court disclaimed predicting whether, at trial, the plaintiff would be able "to shoulder the burden of proving respondent's knowledge." 337 U.S. at 178. *Urie* thus approves a notice principle that is analogous to the notice concept applied in petitioner's case, and requires proof of actual or constructive knowledge as a prerequisite to recovery, as was done in petitioner's case.

Urie belongs to a series of decisions through which this Court secured a uniform application of the FELA in the state and lower federal courts on two principal questions: the division of responsibility between court and jury in a federal civil case, and the appropriate burden that an FELA plaintiff faces in proving causation. Some courts were taking cases away from juries based on improperly onerous burdens of pleading or proof. Some courts had also failed to recognize that the FELA created a uniquely light causation requirement—a plaintiff had to prove only that the defendant's negligence played some part in causing his damages—and had instead insisted on proof of sole or principal proximate cause.

This line of cases reached its fullest expression in *Rogers v. Missouri Pacific Railroad*, in which the Mis-

souri Supreme Court had reversed a plaintiff's verdict, ruling that the employee's conduct was the sole cause of his mishap or was at least as probable a cause as any negligence of the employer. 352 U.S. at 504-05. Sufficient evidence clearly existed to permit the jury to find the railroad negligent; the dispute involved causation. Observing that many courts had misinterpreted the FELA's unusual causation scheme that imposed liability for injury "resulting in whole or in part from [the employer's] negligence," 45 U.S.C. § 51, this Court stated emphatically that an FELA case must go to the jury where the "proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

On the same day it decided *Rogers*, this Court in *Herdman v. Pennsylvania Railroad*, 352 U.S. 518 (1957), held that "a jury question of negligence was not presented by the proofs," where a railroad employee fell when his train braked suddenly to avoid hitting an automobile that unexpectedly crossed the train's path. 352 U.S. at 520. Thus, while this Court was emphasizing in *Rogers* the FELA's relaxed causation inquiry, it was simultaneously reconfirming in *Herdman* that an FELA plaintiff must prove the employer's negligence.

Schulz v. Pennsylvania Railroad, 350 U.S. 523 (1956), and *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), are cases in this line. In *Schulz* the trial court had directed a defendant's verdict on the ground that the plaintiff had failed to show causation. 350 U.S. at 523. This Court ruled that the plaintiff's case should have gone to the jury because the evidence showed employer negligence in requiring its employee to work in an obviously dangerous situation, and the circumstances of the employee's death strongly suggested that those dangerous conditions had contributed to his death. 350 U.S. at 526.

In *Wilkerson*, the state courts had ruled in favor of the defendant as a matter of law on the grounds that the "plaintiff's own negligence was the sole proximate cause" of the plaintiff's injuries and that the railroad was not negligent. 336 U.S. at 55. There was evidence that railroad employees had continued their longstanding and open practice of using a greasy, oily, and slippery walkway over an open maintenance pit, even after the railroad installed safety chains around it, thus suggesting that the railroad had actual or constructive knowledge of this continued use. 336 U.S. at 57-61. This Court therefore reversed and remanded the case for trial, emphasizing that the resolution of disputed issues of fact is for the jury, not the court, where the evidence permits varying conclusions.[5]

Petitioner also discusses two decisions from Courts of Appeals that are crucially unlike the case at bar in that, in each, evidence existed from which the jury could conclude that the defendant railroad knew or should have known of the offending defective condition before the plaintiff was injured. In *Beattie v. Elgin, Joliet & Eastern Railway*, 217 F.2d 863 (7th Cir. 1954), the court affirmed a plaintiff's judgment because the evidence justified a conclusion that the obviously unsafe condition that caused the plaintiff's injury "had existed frequently and recurringly for such a long time that defendant had constructive notice thereof." 217 F.2d at 866.[6] The court

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[5] Petitioner also briefly cites *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963). *Gallick* is another decision in the *Rogers* line of cases. 372 U.S. at 114-17. Additionally, *Gallick* states that "reasonable foreseeability of harm is an essential ingredient of [FELA] negligence." 372 U.S. at 117. Petitioner's burden under instruction No. 12 was in part a reflection of this proposition.

[6] Petitioner's quotation (Pet. at 18) of a sentence from *Beattie*, as quoted in *Chicago Great Western Railroad v. Smith*, 228 F.2d 180, 184 (8th Cir. 1955), is potentially misleading when read out of context. The *Beattie* decision rests on the case law establishing that if a dangerous condition has existed sufficiently long that the railroad, in the exercise of ordinary care, ought to have known of

in *Chicago Great Western Railway v. Smith*, 228 F.2d 180, 183-84 (8th Cir. 1955), affirmed a judgment for an employee injured while transporting cargo over a walkway, where evidence suggested that the walkway was unsafe when originally constructed by the railroad some months previously. Thus, the plaintiff in both of these cases had the crucial evidence of actual or constructive notice that petitioner lacked here.

The present case does not involve the causation inquiry that is the principal focus of the line of decisions on which petitioner relies. In its opinion here, moreover, the Virginia Supreme Court applied precisely the correct standard for allocating duties between court and jury. It viewed the record in the light most favorable to the petitioner and gave him the benefit of every reasonable inference arising from the evidence. The failure of *this* record to create a jury issue on negligence creates no conflict with decisions where the evidence did create a jury issue.

III. THE SUPREME COURT OF VIRGINIA DECIDED THIS CASE CORRECTLY.

A. No jury issue existed on constructive notice.

The principal question in this case has always been whether there was any evidence in the record from which the jury reasonably could have concluded that petitioner had met his burden under instruction No. 12 of proving

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its presence, then the railroad can be found negligent in failing to provide a safe place for working. The *Beattie* court reasoned that because the railroad regularly assigned employees to work in the location in question, the railroad was chargeable with knowledge of the *recurring* conditions *normally* existing there. 217 F.2d at 866. The isolated sentence quoted by petitioner, if not set within its context, might suggest the erroneous proposition that a railroad is automatically chargeable with knowledge of *any* condition that its employee encounters at a location at which he performs assigned duties. The essential fact that determined the outcome in *Beattie*, but that is absent in the case at bar, was the recurring, normal presence of an obviously unsafe condition at the assigned workplace.

that NW knew, or, in the exercise of ordinary care should have known, that the condition described by petitioner existed, and that NW had a reasonable opportunity to remedy this condition before petitioner encountered it. The Virginia Supreme Court correctly answered this question: "no."

By the express terms of the statute under which petitioner sued, proof of NW's negligence was an essential part of his claim. 45 U.S.C. § 51 (Pet. at 4); *Herdman v. Pennsylavnia Railroad*, 352 U.S. at 520 (holding that "a jury question of negligence was not presented by the proofs" and affirming a directed verdict entered for the railroad in a brakeman's FELA action).

This Court has described the evidential burden of an FELA plaintiff as follows:

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. [Citation omitted.] Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." [Citations omitted.] If that requirement is met, . . . the issues may properly be presented to the jury.

Tennant v. Peoria & Pekin Union Railway, 321 U.S. 29, 32-33 (1944). In the same vein, this Court has said:

> Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.

Schulz v. Pennsylvania Railroad, 350 U.S. at 526.

Here, where petitioner claimed that NW was negligent because of a defect in premises, he was required to show that NW knew, or in the exercise of ordinary care should have known, of the defect and had a reasonable opportunity to remedy the condition. *E.g., St. Louis Railway v. Ingram*, 124 Ark. 298, 187 S.W. 452, 453 (1916), *aff'd*, 244 U.S. 647 (1917). The trial court therefore gave the jury instruction No. 12, quoted above. Petitioner had no objection to this instruction, and it became the law of the case.

As the Virginia Supreme Court recognized, the record contains no evidence that NW actually knew of the protruding split crosstie that petitioner said he saw briefly after he fell. (App. 12.) Lacking evidence of such actual knowledge, petitioner's case necessarily rested entirely on the theory that NW should have known of the alleged condition in time to remedy it. But the record contains no evidence directly about, or creating an inference favorable to petitioner about, when the allegedly unsafe condition arose, how long it had existed, or what caused the condition to exist. No evidence suggests that the condition petitioner claimed to have seen after his fall existed before his fall, or existed a sufficient time before his fall that NW had an opportunity to discover and remedy it. Indeed, save for petitioner's own testimony, no evidence suggests that the condition ever existed, before or after petitioner's fall. The jury was thus left wholly to impermissible speculation regarding whether NW, in the exercise of ordinary care, should have known of the alleged condition and had a reasonable opportunity to remedy it.

No evidence suggests that NW's frequent inspections were other than perfectly adequate. The evidence of twice-weekly inspections, including an inspection on the Thursday before petitioner's Friday accident, and of the recent major maintenance performed on the track, all leads most naturally to an inference that no discoverable defect existed. The evidence that petitioner's supervisor

was unable to find any protruding tie end when, in broad daylight the next morning, he inspected the area to which petitioner had called his attention, coupled with the complete lack of any evidence corroborating the existence of a protruding tie, also strongly suggests that no discoverable defect existed.

No inference about when the alleged defect first became visible, what caused it, or whether NW in the exercise of ordinary care should have discovered it arises from the intrinsic nature of the situation petitioner said he saw. The only detailed evidence is petitioner's assertion that, after he fell, he saw the end of a split crosstie protruding two to four inches above the surrounding ballast. Petitioner admitted that this was not an unusual situation, and that he had seen such differentials "quite often." On his accident report, petitioner himself could not identify the condition he claimed to have seen as a "defective" condition. This evidence discloses nothing that should or would have called NW's attention to the area before the incident. In particular, this evidence gives rise to no inference regarding how the condition came to exist, how long it had existed, or whether NW, in the exercise of ordinary care, should have discovered and remedied it.

Given the total lack of evidence in this case regarding the origin, longevity, and discoverability of the condition petitioner said he saw, the jury had no basis except speculation on which to conclude that a dangerous condition existed that NW should have discovered and fixed before petitioner encountered it. The condition could have arisen shortly before petitioner encountered it as the result of the action of the elements, through the natural shifting of ballast, or through a lightning strike. The condition could have been caused by vandalism, or by the passage of a large animal or person, or by the operation of equipment on or near the tracks, such as a 4-wheel drive vehicle or an ATV. The protrusion could have first appeared when part of a tie was dislodged by the force of petitioner's own foot striking it. The end of the

tie could have come to protrude above the ballast only when petitioner stumbled and fell, causing ballast to shift. These are but illustrations of the uncircumscribed realm of speculation in which the evidence left the crucial issue of whether a defect existed that NW, in the exercise of ordinary care, should have discovered in time to have a reasonable opportunity to remedy. Petitioner did not have to disprove all of these potential theories, but as *Tennant* states, he did have the burden of introducing evidence that removed the issue from the realm of speculation and gave the jury an evidential basis for resolving it in his favor.

It is not difficult to hypothesize the types of evidence that could have given rise to the inference petitioner needed, if such evidence had been available. A sighting of the condition and a report of it as a defect before petitioner's accident would clearly have provided the missing link. Post-accident identification and examination of the condition might have suggested its long-term existence through, for instance, evidence of weathering on wood surfaces normally not exposed to the elements, or evidence of the long-term presence of dirt and gravel under an elevated portion of the crosstie, or evidence of markings on the wood or in the area suggesting a particular cause that was likely not of very recent origin. It was petitioner's total lack of any evidence of this sort—his lack of any evidence removing the questions of origin, duration, and discoverability from the realm of total speculation—that doomed his case.

In his argument petitioner relies primarily on the trial court's remark, made in denying NW's motion to strike, that the jury could "find from the evidence that something as heavy as a railroad tie wouldn't spring up instantaneously and be in such a condition weighed down by a railroad track." (Tr. II.60-61.) As the Virginia Supreme Court recognized, the trial court was mistaken. (App. 13-14.) The trial court's comment appeared to envision a condition in which part of a tie underlying the

rails was lifted up above its normal position despite the weight of the tracks. No evidence in the record supported any such conception. The trial court's comment also appeared to reflect the improper influence of the artist's drawing (the primary ground for NW's alternative request for a new trial), which depicted, without sufficient evidential support, an arguably discoverable condition involving a large and abnormally elevated portion of a crosstie. In any event, the trial court's comment mirrored the crucial deficiency in petitioner's case. In making this comment, the trial court was guessing, without evidential support, about the cause, duration, and discoverability of the alleged defective condition.

A straightforward application of the governing federal principles to the record in this case compels the conclusion that the Virginia Supreme Court reached: as a matter of law, no jury issue existed on the question of constructive notice.

B. The lack of floodlights at the Webb siding was not an alternative basis on which the jury could have found NW negligent.

In petitioner's brief filed in opposition to NW's petition for appeal to the Virginia Supreme Court, petitioner resurrected a theory he had initially pled but had then ignored in subsequent trial court proceedings: he suggested that the jury might have found NW negligent on the alternative theory that it breached its duty to use reasonable care to provide a reasonably safe place to work because the eastbound main line was not floodlit at night and petitioner stumbled while working by lantern light. The Virginia Supreme Court accurately noted that petitioner "abandoned this theory at trial because he did not present any evidence of inadequate illumination." That court also rejected this alternative theory on its merits. (App. 14-16.)

Any theory of inadequate lighting as negligence was insupportable in this case both factually and legally,

which is undoubtedly why petitioner did not pursue it at the trial level. The evidence established that petitioner was working at night at an unlighted siding in a remote location in West Virginia between NW's eastbound and westbound main lines. The evidence disclosed no buildings or ongoing activities at the site. This was merely a location at which NW could park a string of cars for later pickup—precisely the job in which petitioner's crew was engaged. The evidence showed that working at night is part of a brakeman's normal duties (Tr. I.110-11; II.83), and that when they work at night, NW brakemen carry a lantern having two bulbs, one providing a focused beam for shining on the work at hand and the other casting a broad light below for walking. (Tr. I.65; II.84.) Petitioner himself confirmed that his lantern was turned on while he was working, that he had not tripped before the incident of which he complained, and that by using his lantern he had experienced no difficulty seeing where he was going well enough to avoid tripping until the time of his accident. (Tr. I.111-12.) After he fell, he looked around by lantern light and had no trouble seeing the "split crosstie" that he thought had caused him to fall. (Tr. I.114.)

Petitioner did not introduce any evidence at trial regarding a standard of care with regard to lighting the eastbound main line where he fell. He introduced no evidence, either lay or expert, suggesting implicitly or explicitly that NW should have provided lighting in addition to the two-beam lantern that petitioner carried with him. He did not claim that he fell because of inadequate lighting. As a purely factual matter, therefore, the evidence could not support any claim that NW breached a duty of reasonable care to provide reasonable lighting under the circumstances.

NW has found only one FELA decision even addressing a claim that a railroad was negligent by failing to provide broad artificial lighting for railroad employees performing ordinary nighttime activities for which a hand-

held light source was ordinarily sufficient. In *Dolmage v. Chicago, R.I. & P.R. Co.*, 63 N.W.2d 273 (Minn.), *cert. denied*, 348 U.S. 822 (1954), the Minnesota Supreme Court ruled as a matter of law that a railroad could not be held liable under the FELA for failing to provide permanent lighting in a switchyard where an employee who had forgotten his flashlight fell while crossing the yard:

> *Surely a railroad need not provide a scheme of fixed lighting for routes which are used by its employees infrequently and which can be adequately lighted by flashlight when the occasion arises.* . . . to sustain a jury's finding that a railroad was negligent in failing to provide adequate lighting under circumstances such as presented here, where a flashlight would be otherwise adequate, would make our previous conclusions meaningless and, for all practical purposes, would make a railroad an insurer of its employee's safety while in its yard at night. *It would impose upon railroads the intolerable burden of lighting every foot of trackage where an employee might possibly cross during the hours of darkness in anticipation of the possibility that the employee's flashlight might fail mechanically or be mislaid.* We find nothing in the Federal Employers' Liability Act to indicate such a legislative intent. Accordingly, we hold that the evidence fails to establish that defendant was under any duty to light the trackage area in question and that it is insufficient to support the jury's finding that defendant was negligent in failing to provide adequate lighting under the circumstances of this case.
>
> Mindful that this is a federal question we have examined the federal decisions, but we have found none that would indicate a result contrary to that we have reached.

63 N.W.2d at 277 (emphases added).

The present case is even clearer than *Dolmage*. Petitioner's accident took place in a remote location on the main line, not in a switchyard. Petitioner was using his

railroad-issued two-beam lantern, whereas the plaintiff in *Dolmage* had forgotten his own flashlight. The evidence in the present case is unrebutted that the light from petitioner's lantern was sufficient for him to walk without difficulty and perform his duties. No evidence suggests that general floodlighting of the eastbound main line, where petitioner ultimately testified he fell, was appropriate or necessary. Under these circumstances, *Dolmage*'s ruling that a railroad has no duty to light every foot of trackage where an employee might possibly walk during the hours of darkness applies with redoubled force.

Finally, petitioner abandoned any theory of inadequate lighting as negligence in the trial court, and the Virginia Supreme Court properly refused to allow him to revive it on appeal. The Virginia Supreme Court "review[s] cases on the theories upon which they were tried in the court below." *Myseros v. Sissler,* 239 Va. 8, 10 n.2, 387 S.E.2d 463, 464 n.2 (1990). Petitioner was not in the position of a litigant who could assert that the trial court had reached the right result for the wrong reason, or who could rely on alternative supporting grounds that were fully developed and presented to the trial court. This was, rather, a situation in which an abandoned theory was tardily resurrected out of concern for the viability of the theory on which the case was tried.

In his motion for judgment, petitioner listed failure to provide proper lighting as one basis for his claim. (R. 2.) He did not pursue this theory, however. Instead, he developed and presented his case solely on the theory that NW was negligent in failing to discover and fix a split crosstie on the eastbound main line. Petitioner did not mention any theory of inadequate lighting as negligence in his opening statement to the jury. He introduced no evidence suggesting that a railroad has a duty to floodlight its main line tracks, or that the light from his dual-bulb lantern was insufficient to permit him to perform his duties safely. He did not argue any theory of inadequate lighting to the

jury in closing argument.[7] He did not ask for or receive any instructions on such a theory. He did not raise this theory in the briefing on NW's motion to set aside the verdict. He first reasserted this alternative theory as a fallback position in his brief in opposition to NW's appeal.

It is quite true that darkness was a circumstance of this case. Petitioner mentioned it in his opening statement, his evidence, and his closing argument. But petitioner fails to recognize the distinction between mentioning the undisputed *fact* of darkness and asserting a legal theory of negligent failure to provide adequate lighting under the circumstances. Such a theory requires proof of the existence of a duty, breach of that duty, causation, and damages. Petitioner failed to present at trial any evidence or any argument on these essential elements of a legal theory of inadequate lighting. Because petitioner clearly contemplated this theory when he first filed his case but failed to pursue it, he waived the theory he now attempts to reassert. *Bergmueller v. Minnick*, 238 Va. 332, 338, 383 S.E.2d 722, 725 (1989) ("Waiver is the voluntary, intentional abandonment of a known legal right.").

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[7] Because the claim of inadequate lighting had disappeared from the case after the filing of the motion for judgment, and it had not figured in any way in the trial or post-trial proceedings, NW's counsel did not originally request transcription of petitioner's opening statement and closing argument. Thus, those segments of the trial were not part of the transcript that was filed with the Supreme Court of Virginia and made part of the record on appeal. The inadequate lighting theory first resurfaced in petitioner's brief in opposition to NW's state petition for appeal, which was filed long after expiration of the 60-day period allowed by the Virginia Rules for filing trial transcript. *See* Rules 5:10(a)(7) and 5:11(a) of the Rules of the Supreme Court of Virginia. At that point NW's counsel did obtain transcriptions of plaintiff's opening statement and closing argument and verified that no theory of inadequate lighting was mentioned or argued. NW's counsel is confident that petitioner's counsel will concede that the inadequate lighting theory was not mentioned in petitioner's opening statement or closing argument.

CONCLUSION

This is simply a case where the proof failed to raise a jury issue on negligence. It involves no misapplication of state common law standards to an FELA action, contrary to the assertions in petitioner's Questions Presented. It presents no conflict with applicable federal decisions. Instead, it represents an appropriate and unexceptional application of the proper federal legal standards to the evidence. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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